SUPREME COURT, U. S.

FILED

APR 21 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1968

No. 1297

JOHN M. RILEY,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Sidney Balick
Bernard Balick
AERENSON & BALICK
604 Farmers Bank Building
Wilmington, Delaware 19801
Attorneys for Petitioner

Dated: April 21, 1969

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

OPINION BELOW 1
JURISDICTION 2
QUESTION PRESENTED 2
CONSTITUTIONAL PROVISION INVOLVED 2
STATEMENT 2
REASONS FOR ALLOWING THE WRIT 5

TABLE OF AUTHORITIES

CASES:

Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873 5
Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 . . . 6

STATUTES:

Delaware Code Annotated, Vol. 13 2
Delaware Code, Title 11, § 669 (1963) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

JOHN M. RILEY,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

John M. Riley prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Delaware.

OPINION BELOW

The opinion of the Supreme Court of the State of Delaware is reported at ___ Del. ___ , 249 A.2d 863 (A1).[1] The opinion of the Superior Court of the State of Delaware In and For New Castle County is unreported (B1).

[1] This refers to page 1 of the appendix to this petition.

JURISDICTION

The opinion of the Supreme Court of the State of Delaware is dated January 10, 1969; it was filed with the clerk January 13, 1969. Riley's petition for re-argument was denied January 23, 1969. There is no "judgment" or "entry of Judgment" under the Rules of the Supreme Court of Delaware. See Volume 13, Delaware Code Annotated. 28 USC § 1257(3) confers jurisdiction on this Court.

QUESTION PRESENTED

Did a policeman who entered petitioner's apartment under a search warrant that did not particularly describe telephone conversations among the things to be seized make an unconstitutional seizure when he answered petitioner's telephone and recorded the statements of persons who thought they were speaking with petitioner?

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States are set forth in Appendix C to this petition (C1).

STATEMENT

On July 21, 1967 a number of policemen entered the apartment occupied by petitioner. They entered under authority of a search warrant. Various kinds of tangible personal property were particularly described as subject to search and seizure under the warrant. Telephone conversations were not mentioned.

Petitioner was charged in two counts with violations of Title 11, § 669 Delaware Code 1963, which prohibits, among other things, recording bets on horce races or keeping equipment for that purpose. There was a non-jury trial on March 20, 1968 before the Superior Court of the State of Delaware in and for New Castle County.

When a policeman was asked to testify to the content of a telephone call answered by him while in petitioner's apartment, petitioner objected as follows (T91, 92 *et seq.*):[2]

> "I object on a couple of grounds.
>
> * * *
>
> The second ground is supported by recent Supreme Court of the United States decisions, two of them—Berger versus New York, 388 U.S. 41-67, and U.S. against Katz, which is also a 1967 decision."

The trial judge overruled petitioner's motion thus (T98,99):

> "As to the Katz case, I have read it. When you spoke about the phone booth it did refresh my recollection. I did read it, have some idea initially, did skim it here. All I can say is this case is entirely different on the facts. The key here is there is an entry into the apartment pursuant to a valid warrant. You can approach it either of two ways. You could approach it the way Mr. Elliott did and say they do not know in advance the telephone is going to ring, or if you wanted to approach it the other way, if you want to consider the telephone is common gambling paraphernalia, but I do not care which way you approach it.
>
> It seems to me the entry, if the entry into the apartment is legal pursuant to a valid search warrant, the police have always—and I am using terms again—been permitted to answer the telephone and testify as to the telephone conversation. If the case is to be interpreted that broadly as prohibiting that activity, it seems to me perhaps the Federal Court should have another crack and tell us that specifically. I am not going to carry it beyond what it says. I think this case will stand or fall on the facts.
>
> As to the Delaware statutes I just do not think they prohibit the police from answering the tele-

---

[2] This refers to pages 91 and 92 *et seq.* of the transcript of the trial record.

> phone, even in the search and seizure area. I think the thing they are contemplating in the statutes are things you take out of the apartment. I do not think they were intended to be all inclusive as far as a telephone conversation is concerned, and they have never been interpreted as barring, to my knowledge, answering a telephone once entry has been gained. So I overrule your motion."

The policeman testified that he answered the telephone a number of times, listened to what was said, and, if necessary, impersonated petitioner (T100 *et seq.*). According to the policeman's testimony, the persons calling were, for the most part, attempting to place bets on horse races. When it was pointed out to the policeman, who testified as an expert for the State, that the races bet had been completed for sometime before the calls were made, he admitted that it is extremely unlikely that such a thing would ever happen (T112, 126 *et seq.*).

Petitioner was found guilty and appealed to the Supreme Court of the State of Delaware, contending that the trial court erred in overruling petitioner's objection to the policeman's testimony about the statements heard by him over petitioner's telephone. The court's response to petitioner's contention was as follows:

> "Appellant's final contention concerning these telephone conversations is that the act of the police officer was an unreasonable search and seizure. He relies upon *Berger v. New York*, 388 U.S. 41, 87 S. Ct. 1873. That case dealt with a New York statute which permitted eavesdropping by wire taps. It was held to be unconstitutional under the Fourth Amendment. The facts of that case differ so greatly from the present one that it furnishes no useful precedent here. As we have said, this is not a 'wire tapping' case and is not made illegal by any Delaware or Federal statute." (A5, 6)

Petitioner's conviction was affirmed. Petitioner contends that without the testimony about the telephone calls there would not have been sufficient evidence to sustain the charge against him.

REASONS FOR ALLOWING THE WRIT

The state courts did not follow the ruling of this Court in *Berger v. New York,* 388 U.S. 41, 87 S. Ct. 1873, that messages transmitted by telephone are protected from unreasonable search and seizure by the Fourth Amendment. The state courts simply stated that *Berger* is distinguishable on its facts from the present case. Petitioner contends that the principle enunciated in *Berger* is nevertheless controlling.

In *Berger* this Court, referring to the first wiretap case, said:

> "Statements in the opinion that 'a conversation passing over a telephone wire' cannot be said to come within the Fourth Amendment's enumeration of 'persons, houses, papers, and effects' have been negated by our subsequent cases as hereinafter noted. They found 'conversation' was within the Fourth Amendment's protection, and that the use of electronic devices to capture it was a 'search' within the meaning of this Amendment, and we so hold."

The Fourth Amendment requires that a search warrant must particularly describe the things to be seized. Telephone conversations were not particularly described in the warrant authorizing a search of petitioner's apartment. Therefore, the telephone conversations were seized in violation of the Fourth Amendment.

It is now well settled that the limitations of the Fourth Amendment are made applicable to the states by the Fourteenth Amendment, and that conversations seized in

violation of those limitations cannot be presented into evidence in a criminal prosecution in a state court. *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081.

Respectfully submitted,

AERENSON & BALICK

By Sidney Balick
Bernard Balick

Attorneys for Petitioner
604 Farmers Bank Building
Wilmington, Delaware 19801

Dated: April 21, 1969

APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

JOHN M. RILEY,
Defendant Below,
Appellant,

v. No. 69, 1968

STATE OF DELAWARE,
Plaintiff Below,
Appellee.

January 10, 1969

WOLCOTT, Chief Justice; CAREY and HERRMANN, JJ., sitting.

Upon appeal from the Superior Court. Affirmed.

Sidney Balick and Bernard Balick, of Aerenson & Balick, Wilmington, for plaintiff below, appellant.

John P. Daley, Deputy Attorney General, for plaintiff below, appellee.

CAREY, Justice:

The appellant, John M. Riley, was convicted after a non-jury trial, of violating Title 11, §669(a) Del. C. 1953, which prohibits keeping or using paraphernalia for non-licensed betting operations. He charges error in three rulings made by the trial Judge in Superior Court: (1) denial of appellant's motion to exclude testimony concerning certain telephone calls received while the police were in the apartment and heard by one of the officers; (2) denial of appellant's motion to compel the State to reveal the identity of an informer whose information constituted part

of the basis for the issuance of a search warrant; (3) denial of appellant's motion to suppress all evidence obtained through a search of the apartment after an allegedly illegal entry.

The police obtained a search warrant from a Judge of the Municipal Court on the basis of an affidavit executed by two officers. The warrant was for the search of a second-floor apartment which, according to the record, was leased to someone other than the defendant. Upon their arrival at the premises, the officers found the front door of the building closed but unlocked. They entered through that door and went up to the apartment described in the search warrant. According to their testimony, which was accepted by the trial Judge, they knocked and announced their identity. After waiting about twenty seconds without receiving an answer, they entered the apartment and found the defendant therein. They then searched the apartment and discovered various paraphernalia commonly used in receiving bets on horse races. While they were in the apartment, the telephone rang several times and was answered by an officer. Two of the callers placed bets on various horses at several tracks. Two or three of the other callers asked for the results of particular races which had been run that day. Other callers hung up when told that defendant was not available.

I.

Appellant's first motion alleges that the telephone messages were "intercepted" illegally in violation of the Delaware statute, 11 Del. C. § 757, as well as the Federal Communications Act, 47 U.S.C.A. § 605, and were therefore inadmissible at the trial under the Fourth Amendment to the Federal Constitution. See *Lee v. Florida*, ___ U.S. ___, 88 S. Ct. 2096.

The Delaware statute (11 Del. C. § 757) reads as follows:

> "Whoever taps or makes connection with any telegraph or telephone line, wire, cable or instru-

ment belonging to a telegraph or telephone company; or

"Whoever reads, takes copy, makes use of, discloses, publishes or testifies concerning any dispatch or message, communication or report intended for another passing over such telegraph or telephone line, wire, or cable, in this State –

"Shall, for each such offense, be fined not less than $500 or imprisoned not more than 1 year, or both."

In *Tollin v. State,* 7 Terry 120, 78 A.2d 810, it was held that the forerunner of this statute barred testimony of telephone calls heard by listening on the defendant's receiver. That decision was made prior to the present 1953 Delaware Code. The statutory provision involved in *Tollin* (§5232 of the Code of 1935) contained language which was omitted from §757 as included in the 1953 Code, and which may or may not have justified the holding in *Tollin.* We need not, therefore, determine whether the *Tollin* case was or was not correctly decided. The language of the present Code section is now the law of the State, *Monacelli v. Grimes,* 9 Terry 122, 99 A.2d 255, and we look only to it for guidance.

The second quoted paragraph of §757 prohibits disclosure of any message intended for another "passing over *such* telegraph or telephone line, wire, or cable. . . ." The word "such" can only refer back to those lines or wires described in the first paragraph which speaks only of lines which someone has tapped or made connection with. Obviously, that is not the situation in this case; the officer merely answered the phone when it rang and heard what the callers said; he made no positive misrepresentations of his identity and, when any callers asked for the defendant, he stated that the defendant was not available. We agree with the ruling by the trial Judge that nothing in this statute forbids admission of the testimony concerning these conversations. This conclusion finds support in *State v. Carbone,* (N.J.)

183 A.2d 1. Assuming, *arguendo*, that the *Tollin* case, *supra*, was correctly decided, it is no longer the law of this State.

Appellant next claims that the officer's testimony concerning the telephone conversations violated the Federal Communications Act. If this be true, the evidence would, of course, be inadmissible in a State Court under the recent holding in *Lee v. Florida, supra*. As we understand the Federal Act, it prohibits unauthorized interception and disclosure of intercepted communications. "Interception," as used in this statute, has been interpreted to mean the introduction of an independent receiving device between the sender and the receiver. *U.S. v. Lewis*, 87 Fed. Supp. 970; *U.S. v. Pasha*, 332 F.2d 193; *Billeci v. U.S.*, 184 F.2d 394. This definition was extended in *Lee v. Florida, supra*, to cover the situation where the police deliberately obtained a party-line telephone on the same line as the defendant's and used certain devices to overhear conversations on that party line without defendant's knowledge. In the present case, however, there was no such interception and the evidence was properly admitted since it is not affected by the Federal statute.

Appellant's final contention concerning these telephone conversations is that the act of the police officer was an unreasonable search and seizure. He relies upon *Berger v. New York*, 388 U.S. 41, 87 S. Ct. 1873. That case dealt with a New York statute which permitted eavesdropping by wire taps. It was held to be unconstitutional under the Fourth Amendment. The facts of that case differ so greatly from the present one that it furnishes no useful precedent here. As we have said, this is not a "wire tapping" case and is not made illegal by any Delaware or Federal statute.

In our opinion, there was no error in admitting this evidence.

II.

Appellant's second motion sought to compel the State to reveal the identity of the informer whose information furnished part of the basis for the search warrant. The record contains a complete copy of the supporting affidavit filed with the Municipal Court Judge. That affidavit clearly shows that the police had sufficient personal knowledge, apart from that supplied by the informer, to justify the issuance of the warrant. The informer's information was therefore not essential to establish probable cause.

During the *voir dire* conducted at the trial to determine the validity of the search warrant, the officers who signed the affidavit testified to those matters which they had personally seen and heard. The appellant and a witness denied the truth of what the officers had said. The Judge found in fact that the officers were telling the truth and therefore refused to hold the warant invalid. Appellant's present argument appears to be that he is entitled to know the identity of the informer because he and his witness had challenged the accuracy of the officers' testimony. We are unable to accept this contention. *Scher v. U.S.*, 305 U.S. 251, 59 S. Ct. 174. Public policy requires that ~~in~~ informer's identity be protected unless the defendant shows that its disclosure would materially aid his defense. There has been no such showing here. The rule of protection should not be eroded simply because a defendant contradicts the testimony of the officers who swore out the warrant on the basis of their own observations.

In our opinion, the trial Judge was justified in refusing to compel identification of the informer.

III.

Appellant's third motion was to exclude the evidence obtained at the apartment because of an alleged failure of the police to knock and announce their identity before entering the apartment building; it cannot be predicated

upon a failure to "knock and announce" at the door of the apartment itself because at that point the officers complied with that requirement. We think the basic question here should be whether the actions of the officers were reasonable under the circumstances. *Patrick v. State*, ___ Story ___, 227 A.2d 486. They found the outside door closed but unlocked so that there was no necessity to ring the buzzer to gain admission. The reasons for the existence of the knock and announce rule were amply served by the knocking and announcement at the apartment door itself. Cf. *Sabbath v. U.S.*, ___ U.S. ___, 88 S. Ct. 1755. Furthermore, having in mind the nature of appellant's activities in the apartment, the police, by announcing themselves to him over this device and waiting for him to admit them, would have thereby provided him with time to render their search valueless by disposing of much of the evidence ultimately seized. We see nothing unreasonable in the conduct of the officers in this case. We accordingly agree that the trial Judge rightfully permitted the introduction of the evidence.

For the foregoing reasons, the judgment below will be affirmed.

APPENDIX B

SUPERIOR COURT OF THE STATE OF DELAWARE

WILLIAM T. QUILLEN
Associate Judge

COURT HOUSE
WILMINGTON, DELAWARE

April 10, 1968

Richard G. Elliott, Jr., Esquire
Deputy Attorney General
Public Building
Wilmington, Delaware

Sidney Balick, Esquire
604 Farmers Bank Building
Wilmington, Delaware

Re: *State v. John M. Riley*
1243 Cr. A. 1967, Opinion
and Verdict in Nonjury Trial;
Guilty of Both Counts

Gentlemen:

Initially, a word should be stated about my ruling on the objection to evidence based on the *Tollin* case, found at 78 A.2d 810, 812. That General Sessions decision by Judge Carey has not been followed by several Superior Court Judges within the last year. Unfortunately, most of the decisions, including my own, have been bench rulings in the middle of a trial and do not adequately record in writing the consideration any Judge of this Court must give a decision which disregards a reported opinion of a Judge of long experience and great wisdom. My reason for disagreeing with the result in the *Tollin* case can be stated briefly.

It is important to note that an objection to the admission of evidence based on the ruling in the *Tollin* case is based solely on the Delaware wiretap statute formerly found in

Section 5232 of the 1935 Code and now found at 11 *Del C.* §757. See the first two paragraphs of the *Tollin* opinion at 78 A.2d 812. The language of the statute is crucial:

> "Whoever taps or makes connection with any telegraph or telephone line, wire, cable or instrument belonging to a telegraph or telephone company; or
>
> "Whoever reads, takes copy, makes use of, discloses, publishes or testifies concerning, any dispatch or message, communication or report intended for another passing over such telegraph or telephone line, wire, or cable, in this State –
>
> "Shall, for each such offense, be fined not less than $500 or imprisoned not more than 1 year, or both.
>
> "Nothing in this section shall apply to an employee or authorized agent of a telegraph or telephone company."

I think the error in the *Tollin* opinion lies in reading the second paragraph of §757 in isolation. In particular, I think the word "such" in the second paragraph refers back to the first paragraph of the statute so that phrase "such telegraph or telephone line, wire or cable" means a line, wire or cable which has been tapped or with which some separate connection has been made. The phrase was not intended, in my opinion, to apply to the mere use of a telephone receiver. It should be noted again that when a Judge of this Court holds contrary to the *Tollin* decision, he is only overruling an objection based on the wiretap statute.

Turning to the facts of the case, I note the defense emphasis on the time of the telephone calls received as compared with the post times. The evidence is admittedly difficult to understand, as the policemen candidly testified. The question is whether this difficulty is such that it creates a reasonable doubt in what otherwise appears to be a solid case on both charges. Notwithstanding this one diffi-

culty, I am satisfied beyond a reasonable doubt on the whole record that the defendant was concerned in interest in illegal horse race betting and that the defendant did keep paraphernalia for that purpose. I, therefore, enter a verdict of Guilty on both Count I and Count II.

A presentence investigation will be ordered.

Very sincerely yours,

/s/ William T. Quillen

WTQ:pf

cc: Prothonotary
Presentence Office

APPENDIX C

CONSTITUTION OF THE UNITED STATES

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.